IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. MAGNUS SONS COMPANY, a corporation, Plaintiff in Error, vs. ADAM OREY and W. J. BISHOP, Defendants in Error.	No. 3905

PETITION FOR REHEARING

BAUER, GREENE & McCURTAIN,
Attorneys for Plaintiff in Error and Petitioner.

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Plaintiff in Error, by its attorneys, respectfully petitions the court for a rehearing in this cause on the grounds that it appears by the opinion of the court filed February 5, 1923, that:

I.

The court has misapprehended the record and decided the cause upon issues not in the pleadings as the same had been settled at the time of the trial in the court below.

II.

The court has overlooked the decision of the court below sustaining a motion to strike out parts of the original answer which thereby eliminated from consideration in this review a question which this court holds to be the question at issue.

III.

The court has assumed as proven and decided the cause upon a fact upon which there was conflicting evidence at the trial.

IV.

The court has overlooked an assignment of error predicated upon the refusal of the trial judge to submit to the jury a question of fact upon which there was a conflict of testimony, and upon the assumption of the truth of which fact the lower court peremptorily directed a verdict.

I.

We assume that the conclusion of the court as announced in its opinion filed February 5, 1923, is based only on such parts of the record as are referred to therein. If so, the court failed to consider certain exceptions which were properly before it and the decision as rendered proceeds upon a mistaken assumption of fact. In stating the issues the opinion quotes from the original answer (Trans. p. 13) as follows: "After the owner of said premises had retained one-fourth of the total amount of hops grown thereon as crop-rental for the use of said premises," and in defining the issue to be decided the opinion says: "The crop raised was approximately 40,000 pounds, of which three-fourths were delivered to the plaintiff. The quesiton at issue was whether the remaining one-fourth was included in the

contract so that the defendants were obligated to deliver the same."

That portion of the original answer quoted in the opinion as raising the issue to be decided was specifically moved against by the plaintiff in the court below (Paragraph I of Motion, Trans. p. 20), and the motion was granted in a decision saying that "the motion to strike out the allegations of the answer *with reference to the obligation of the defendants to their landlord and the delivery of hops to him,* and the custom prevailing at the time the contract was made should be allowed" (Trans. 23, 24). Defendants did not apply for a rehearing upon nor seek to review said ruling, but filed an amended answer invoking the equity arm of the court for reformation of the contract (Trans. 26-30). After trial on the Equity side of the court a decree dismissing said defense was entered (Trans. 32-33). No appeal was taken from that decree, and the case went to trial as an action at law (Trans. 33) upon the issues made by the complaint and *what was left of the answer after subtracting both of the further and separate defenses therein* (to which Judge Bean had sustained demurrer), *and the portions stricken out on motion* (Trans 20-24), and the defense of mutual mistake in the execution of the contract. It is apparent therefore that the decision as announced by this court is founded upon an issue not in the case. It was not in the case because it was not in the pleadings at the time of the trial. The court is as much bound by the pleadings as are the parties. The trial court erred in admitting evidence on a point not in

issue and this court is equally in error in affirming such action. The error could only have occurred through misapprehension of the state of the record, although the point was covered by due assignment and specification of error, and was adverted to both in the brief and in oral argument.

In this connection the court has misapprehended the record in another respect. The statement of the case in the opinion says: "The defendants further alleged the existence of a custom and usage in the hop business, that hop ranches were leased upon a crop rental rather than upon a cash rental." There is nothing to show to what extent this finding controlled the decision of the court. It has no place in the decision, because a demurrer (Trans. 21) to the second further and separate defense in the original answer in which said alleged custom and usage is pleaded (Trans. 17-19) was sustained by Judge Bean (Trans. 23-24), and upon the trial Judge Wolverton excluded evidence offered by the defendants to prove the alleged custom and usage saying:

> "As to this matter of custom and usage, the custom was set up in the original answer, and that was stricken out by Judge Bean, so that matter is not now in the pleadings, so far as the law action is concerned. The defendants in this case have amended their answer, and set up an equitable defense, and in that custom and usage were pleaded. The court, as you know, heard that equitable defense, and found, after hearing testimony, that the proof did not sustain the answer, and that disposed

of the equitable matter, and with that, it disposed of the equitable answer. So there is no custom pleaded here now. I doubt very much whether the matter of custom has a great deal to do with the case." (Trans. 45.)

Since it was no longer in the pleadings how could it possibly have anything to do with the case?

II.

The opinion overlooks the fact that the attack upon the original answer which resulted in stripping it of irrelevant matter was more specific than a general demurrer. There was a demurrer to each of the separate defenses, *and also a motion separately to strike specified parts of the entire answer* (Trans. 20-21). The porions of the answer against which the motion to strike was interposed are set forth in the Transcript in italics (Trans. 13-17). Not only were demurrers sustained, *but the motion was granted in its entirety* (Trans. 24), and it is the latter ruling which is important in this review but it is not noticed in the decision of this court.

In discussing plaintiff's contention that Judge Bean's ruling fixed the law of the case the opinion says: "Judge Bean overruled *(sic)* the demurrer to the first answer on the ground that 'it did not allege what the original contract was or that by mutual mistake the provisions permitting delivery of hops to the landlord was omitted.'" The demurrer was *sustained* on the ground stated, not overruled (Trans. 24). This *lapsus calami* may be the result of the *lapsus linguae* of the trial judge

in referring to the "motion to strike the *complaint*" (Trans. 20-21), and is undoubtedly inadvertent and unimportant. We do not complain of accidental errors in terminology, but had counsel made similar mistakes in referring to a perfectly plain record of a case under review he would be open to the charge of unfamiliarity with the issues upon which he assumed to aid the court to a correct decision. The point we now stress is that by implication the opinion appears to hold that Judge Bean's remark to the effect that he found no ambiguity in the contract in suit is *obiter,* and hence that Judge Wolverton, before whom the case was subsequently tried, was not bound thereby, and did not err in admitting evidence on the theory that there was an ambiguity; that the rule of Law of the Case does not apply. The opinion concludes: "What Judge Bean actually decided, was that no case was made by the original answer for the reformation of the contract. We find nothing counter to that decision in any of the rulings of Judge Wolverton".

This is not an appeal from the decree dismissing the amended answer praying reformation. Judge Wolverton's ruling in that behalf is unexceptionable. He held that there was no mutual mistake of the parties in the execution of the contract and, in effect, that a court of equity was not justified in changing the provisions of a contract which the only party responsible for its terms had carelessly drawn (Trans. 35-36, 45). *The error complained of in this review is predicated upon Judge Wolverton's rulings after the equity case was disposed*

of and the cause transferred to the law docket. He was there confined to the issues then remaining, and was bound by the rulings theretofore made in settling those issues whether those rulings were upon demurrers or upon motions to strike. The ruling upon the motion was the important thing, and this was recognized by him in refusing defendants' permission to amend the answer during the trial, where he said: "If you amended your answer it would have to be amended in such a way *as to meet the objection that Judge Bean has ruled upon in this case, because that becomes the law of the case now. I could not permit you to amend so as to set up the same matter that he has stricken out*" (Trans. 46). We press upon the attention of the court the matter stricken from the answer by Judge Bean and urge an inspection of the italicized portions of the original answer as printed at pages 13 to 17 of the Transcript. A comparison thereof with the specifications of plaintiffs' motion to strike (Trans. 20-21) will demonstrate that the matter which Judge Wolverton did not allow defendants to reimport into the case by an amendment at the trial includes not only the plea of custom and usage *but also the allegations of the identical matter upon which the decision of this court is founded.* What Judge Bean decided upon the *demurrer* to the first separate defense of the original answer has no bearing upon this review, but what he decided upon the *motion to strike* has a most important bearing, because it is upon the matters stricken by that ruling that this court apparently has based its decision.

Since the averments referred to were severally attacked by motion on the ground that each of them is irrelevant and immaterial, Judge Bean's remarks in announcing his decision granting the motion to strike obviously were not *obiter dictum.* The motion definitely challenged the right of the defendants to plead that the contract meant anything else than its terms imported. By that motion Judge Bean was called upon unequivocally to decide whether the contract set up in the complaint, its execution having been duly admitted by the answer, was open to the defensive matters moved against. That he so understood the question is manifest by his statement: "Defendants in their answer alleged, among other things, that they were lessees under a contract by the terms of which they were required to deliver a certain part of the hops to the landlord, that they did make such delivery, and delivered the remainder to plaintiff, which they claim was a compliance with their contract" (Trans. 22). The points raised by the motion, and thus stated by the learned Judge, are entirely separate and distinct from points raised by other paragraphs of the motion, and by the demurrers. For instance, in another paragraph of his opinion Judge Bean refers to the allegations of the answer respecting the custom of trade; and then in another paragraph he discusses the allegations of the first separate defense concerning the alleged mistake, and correctly sustained the demurrer thereto on the ground, as quoted in the opinion of this court, that the answer "did not allege what the original contract was or that by mutual mis-

take the provision permitting the delivery of hops to the landlord was omitted".

But the misapprehension which this petition seeks to remove lies in the assumption that Judge Bean decided nothing else than that the demurrer was well taken, or that whatever else he did decide has not sufficient bearing upon the questions raised by this review to merit mention in the court's opinion. The ruling on that demurrer led to the filing of an amended answer which properly raised an equitable defense, but that defense was resolved against the defendants (Trans. 32-33) and both it and the demurrer which led to it and Judge Bean's ruling on that demurrer became merely a part of the history of the case. The ruling on the motion to strike, however, raises the important point in this case, but we find no discussion of or decision of the assignments of errors which alone bring it here for review. On the issue expressly raised by the motion, as above quoted from Judge Bean's opinion, he said: "The contract itself, however, is very definite and certain. It provides for the delivery of a certain number of pounds of hops, of the crops grown by defendants during a certain year on certain premises. There were no exceptions in the contract. * * * I take it, therefore, the motion to strike out the allegations of the answer *with reference to the obligation of the defendants to their landlord and the delivery of hops to him, and the custom prevailing at the time the contract was made should be allowed*" (Trans. 22-23).

Now, as we have said, and it is too plain for argu-

ment, this was not *obiter dictum.* Judge Bean to whom the motion was submitted had to do one of three things: either ignore the motion entirely; or hold the contract ambiguous and therefore open to the defense moved against; or hold the contract definite and certain and therefore not open to explanation. He did the latter and granted the motion. The question was in no sense collateral and his opinion was necessary and essential to the disposition he made of the motion. That decision was never modified nor appealed from, and therefore, as Judge Wolverton remarked at the trial, "it became the law of the case" (Trans. 46), although in admitting evidence and in charging the jury, he wholly disregarded the effect thereof. In other words, and adopting the rule announced by this court in *Presidio Mining Co. v. Overton, 261 Fed. 933,* and applying the same to the allegations of the answer with reference to the obligation of the defendants to their landlord and the delivery of hops to him: *The insufficiency of the original answer thereupon became res judicata in the subsequent proceedings before Judge Wolverton.*

This court quotes the remark of the trial judge: "I have read that opinion of Judge Bean's and gone into it pretty thoroughly, and I might say further, I have consulted Judge Bean about it and I am of the opinion that that decision does not decide the exact question which is now before us" (Trans. 43), as showing that Judge Wolverton did not regard Judge Bean's decision as the law of the case. Whether he so regarded it or not is beside the question. Plaintiff assigns errors pred-

icated upon rulings which disregarded that decision as the law of the case. What is the purpose of settling the issues in advance of trial? Are solemn decisions upon questions of law properly raised by motion or demurrer to be lightly brushed aside at the trial? Are parties never concluded, but compelled at all stages of a lawsuit to re-litigate questions supposed to be settled? Having obtained, upon full hearing and due consideration, a ruling to eliminate irrelevant matter from the pleadings are they bound at their peril to be prepared with witnesses at the trial to disprove some alleged fact upon which the court has decided no evidence is admissible? Is the District Court of the United States a moot court until the day of the trial? Judge Wolverton omitted to state what, if anything, Judge Bean said about his own decision, and in common with this court we are therefore deprived of the advantage of his construction of his own language. Not that it needs any construction. Its terms could not be made clearer nor more definite. The record shows no modification or change in that decision or the order based thereon, and it must therefore be given full faith and credit. Counsel are bound by the official record and so are appellate courts. This petition seeks not Judge Wolverton's opinion of that decision, but the ruling of this court as to whether that decision settled certain issues in this case precluding further inquiry in respect thereof.

If there is any such doctrine as "the law of the case" Judge Wolverton was bound by Judge Bean's decision on the motion and no evidence on any of the matters he

had stricken from the case was admissible. Nor, for the reason that it was not appealed from nor reviewed, is Judge Bean's ruling in that regard open to question in this court. Defendants could have stood upon their original answer and the decisive question of whether they could plead and prove a provision not found in a contract they themselves wrote, could have been raised for determination here. Then, had this court not been "convinced that the contract was of such certain and unambiguous nature as to preclude the admissibility of such testimony", Judge Bean would have been reversed. But defendants waived that prospect and filed an amended answer resting their entire defense on the theory that the contract as written meant exactly what it said and what plaintiff claimed for it, but that by mutual mistake the contract as written had omitted an important reservation, namely, one-fourth of the crop. That issue as heretofore stated was resolved against them and no appeal therefrom was taken. After Judge Bean's decision on the motion defendants themselves no longer had the temerity to claim that their contract obligated them to any less than a delivery of the entire crop and for that reason they elected to seek reformation in equity. We do not charge, because we do not believe, that they were thereby speculating with justice and intended, if defeated in reformation, to return to the same defense at law which Judge Bean had branded with the bar sinister.

The pertinent inquiry, then, on the trial of the law action before Judge Wolverton and jury, was what

issues had already been settled? What was left open for decision? *(Hadden v. Natchaug Silk Co., 84 Fed. 80.)* Judge Bean's dicision on the motion had eliminated all questions relating to the obligation of the defendants to their landlord, terms of their lease with him, delivery of hops to him, custom of trade, etc.; in short, every question predicated upon an assumed ambiguity in the contract. Assignments of error numbered from 1 to 28 (Trans. 103-118; Plaintiff's Brief, 14-15) cover errors of the trial judge in admitting testimony on those questions in violation of the rule, and the opinion of this court affirms his rulings on the ground that there was nothing therein counter to Judge Bean's decision "that no case was made by the original answer for reformation of the contract." Certainly there was not; but this statement in the opinion begs the question which is *were those rulings counter to Judge Bean's decision on the motion?*

His decision on the demurrer to the first separate defense in the original answer has nothing whatever to do with the errors complained of and sought to be reviewed in this proceeding. His decision on the points raised by the motion to strike portions of the original answer has everything to do therewith and this petition seeks the judgment of the court thereon.

If the issues raised by the matter stricken by Judge Bean are not in the case, plaintiff is entitled to recover. They were squarely, definitely and unequivocably ruled out by Judge Bean's decision on the motion to strike them out. If the trial judge was bound by that ruling then his admission of the testimony objected to, his direc-

tion of a verdict for defendants, and his refusal to direct a verdict for plaintiff constitute reversible error.

III. and IV.

Independently of, and without regard to the points above urged, the decision of this court shows a misapprehension upon another point equally fatal to an affirmance of the judgment below. It assumes as proved a fact upon which there was a conflict of evidence. In the statement of the case the opinion recites that plaintiff knew that Hop Lee, defendant's lessor, was to have one-fourth of the crops as rental, and on the third page of the opinion it is again stated "the plaintiff knew that defendants were required to pay one-fourth of the crop as rental to their landlord", and on page 4: "We think it was not error therefore to permit a witness to testify that he told the plaintiff before the contract was entered into that the hop yards were leased upon one-quarter rental". A witness for the defendants, in relating his conversation with plaintiff in Chicago before the contract was executed said: "After we got finished talking I told him that the ones I represented (defendants) leased the yards. He asked me how we leased the yards. I told him we paid crop rents. *I think he asked me how much and I told him one-quarter*" (Trans. 73). On the other hand plaintiff's witness, in his disposition taken long before the trial, testified that *he knew nothing about the terms and conditions of the lease, nor whether it was a crop lease or a cash lease, nor that the lease*

provided that the landlord was to have one-fourth of the crop. (Trans. 85.)

Here was conflicting testimony on the very point which this court has found decisive of this case. As we read the opinion, if plaintiffs did not know when they signed the contract prepared by defendants themselves that one-fourth of the crop was to go to the landlord, plaintiff is entitled to recover. We think that question was decided and foreclosed by Judge Wolverton's decision and decree in the equity case where he held that there was no mutual mistake in the contract, that defendants made a mistake or were not careful enough in drawing their contract, but there was no showing that there was a mistake on the part of the purchaser in the formation of the contract (Trans. 35). We have also shown that upon other grounds the point was not within the issues framed by the pleadings before the court at the time of the trial of the law action. But waiving that argument for the nonce, and considering the present point as if the question of plaintiff's knowledge of the terms of defendant's lease with Hop Lee was properly in issue under the pleadings, and had not been foreclosed by the previous decree nor by any previous ruling, how stands the record?

At the conclusion of the trial to a jury the fact had been affirmed by a witness on one side and denied by a witness on the other. The court thereupon proceeded to comment on the evidence and upon the credibility of one of the witnesses, and stating his belief of the testimony of defendants' witness, peremptorily directed the

jury accordingly to return a verdict for the defendants (Trans. 91-92). True, the trial judge attempted to point out what he was pleased to term a "very plain contradiction" in the testimony of plaintiff's witness on the point, but it was exclusively the function of the jury to pass on that question. It was for the jury to say whether plaintiff's witness had contradicted himself. It was the undoubted right of plaintiff's counsel to argue that matter to the jury. Whether the testimony of that witness was inconsistent or self-contradictory is a matter of construction, and while the court's duty to construe doubtful writings where they are doubtful, and instruct the jury accordingly is unquestioned, it is error, always and everywhere, for the court to exercise that function respecting the statements of witnesses. *(Hickman v. Jones, 9 Wall. 197; 19 L. ed. 553.)*

The opinion says (page 2): "The jury found for the defendants and judgment was entered accordingly". But the jury did not so find. It had no opportunity to make a finding on anything. The court took the consideration of that fact away from the jury (Trans. 100). It is of that action of the court amongst others that we complained by writ of error, and it is the failure of this court to reverse that action or even to notice it that we now complain. It is assigned as error (Trans. 120-123), specified for discussion (Plaintiff's Brief 15), and fully discussed at pages 46 to 51 of the brief.

We are not unmindful that in instructing juries Federal Courts are not bound by State laws or practice and may fairly and impartially comment on the evidence, but whatever may be the opinion of the trial judge as to the credibility of a witness or the facts testified to, the jury

must ultimately determine as to the truth of he tesimony, and this rule is as inflexible in the Federal Courts as it is elsewhere (*Nyback vs. Champagne Lumber Co.*, 109 F. 737; *Coulter v. Thompson Lumber Co.,* 74 C. C. A. 38, 142 Fed. 706). We waive the question whether Judge Wolverton's comment was either fair or impartial; but challenge his right to take the decision of the truth from the constitutional triers of fact. Nor would the fact that defendant offered the evidence for the purpose of aiding the court to interpret the contract make any difference. Even for that doubtful purpose the court had no right to base his interpretation of a written contract upon conflicting evidence of an extraneous fact upon which, according to the court's theory, the construction to be given to the contract and the final decision of the case depended.

This court has, we believe, through misapprehension, adopted the same theory, namely, that knowledge by the plaintiff of the reservation of one-fourth of the crop as rental in defendants' lease of the premises justified the trial court's construction of the contract. The unsoundness of this theory and the admissibility of evidence to sustain it is discussed elsewhere. The immediate point is that the fact of knowledge of the plaintiff on that subject can be found only by passing on the credibility of witnesses and holding the scales between conflicting testimony,—a function which ought to have been left to the jury but was not.

In an application of this kind it is not in order to re-argue questions decided by the opinion but we feel

justified in reminding the court that apparently it has overlooked important clauses in the contract which ought to be considered in determining whether defendants thereby covenanted to sell all of their crop up to 60,000 pounds. They covenanted that the contract "shall have preference both as to *quantity* and quality *over all other contracts* made as to said growth of hops;" that they had "*made no other contract* for the sale of any part of said crop of hops"; that should they sell said hops or any part thereof to another, or refuse to deliver the same to plaintiff, the latter should be entitled to all advances made and damages, and finally, as security for advances made by plaintiff, the contract constitutes a pledge and mortgage of *"the entire crop of hops to be raised upon the premises above described in the year 1919"*. The buyer complied with the terms of the contract in all particulars and made the advances called for on the basis of the crop up to 60,000.

We are probably also foreclosed from questioning the court's statement to the effect that it is not to be supposed that defendants could with any certainty bind themselves to acquire for delivery to plaintiff, hops they did not own. That returns to the main question. If they *did* so bind themselves a supposition cannot relieve them, and they must be held to have assumed the alternative consequences of acquiring the crop or of paying damages. If it is not to be supposed that a man will bind himself to something he knows he cannot perform, it is equally to be supposed that when he does bind himself he must be held to have intended to perform.

Reverse the situation of the parties. Suppose the contract in precisely the same terms had been written by plaintiff and it had agreed to take and pay for "sixty thousand pounds of hops of the crop to be raised and grown by the seller" at 85 cents per pound, and the market price at time for delivery had dropped to 16 cents per pound; and suppose sellers had tendered delivery of the entire crop of 40,000 pounds raised by them that year, and buyers had refused to take or pay for more than 30,000 pounds on the pretext that they had intended to buy only the *seller's share* of the crop and not the one-fourth of the crop which sellers owed their landlord as crop rental, would the provision of the contract for damages to be recovered by defendants in event of such default (Trans. 10) apply? Suppose further, that buyers had brought their bill for reformation of the contract on the ground of mutual mistake seeking to have a court of equity insert into the contract the words "seller's share," or "three-fourths of the crop," and the court had found no mistake and dismissed their bill? Would this court listen with patience to the buyer's subsequent attempt when sued at law for damages, to have the court in a trial to a jury, reform its contract on the ground of its own mistake, in the exact form that had been refused in equity, by taking its own statement as true against the emphatic denial of the seller, and without allowing the jury to say whether it told the truth or not?

We cannot believe that this court would permit such a judicial travesty to prevail. It would amount to a

monstrous perversion of many of the elementary doctrines of the law of contracts and of evidence, violate well settled rules of judicial procedure, and deny fundamental rights to a litigant.

Following the example set by *Mr. Justice Harris* of the Oregon Supreme Court in *Malloy v. Marshall-Wells Hardware Co.,* 90 Or. at p. 334, we borrow, but at greater length, the language used by John Philpot Curran when presenting a motion for a new trial in the celebrated Rowan case ("Speeches of Curran," Callaghan & Co. 1877).

"I call upon the example of judicial character; upon the faith of that high office which is never so dignified as when it sees its errors and corrects them, to say, that the court was for a moment led away, so as to argue from the most seductive of all sophisms, that of the *petitio principii.*"

Respectfully submitted,

BAUER, GREENE & McCURTAIN,

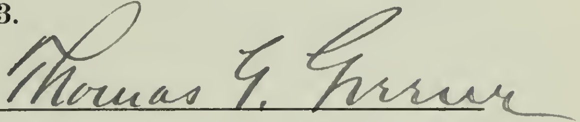
For Plaintiff in Error.

State and District of Oregon,
Multnomah County, } ss.

I, Thomas G. Greene, of counsel for Plaintiff in Error, hereby certify that in my judgment the foregoing

petition for a rehearing is well founded, and that the same is not interposed for delay.

February 28, 1923.



Of Counsel for Plaintiff in Error and Petitioner.